IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re EXPRESS SCRIPTS, INC. PBM LITIGATION	)	Master Case No. 4:05-md-01672-HEA
This Document Relates to: *Lynch* – 4:05-cv-00828 (HEA)	)	

DEFENDANTS' STATEMENT OF UNCONTROVERTED MATERIAL FACTS IN SUPPORT OF THEIR RENEWED MOTION FOR SUMMARY JUDGMENT ON LYNCH'S CLAIMS BASED UPON NEW YORK CONSENT JUDGMENT

COME NOW Defendants Express Scripts, Inc. and National Prescription Administrators, Inc. (collectively, "Express Scripts"), and for their statement of uncontroverted material facts in support of their renewed motion for summary judgment on the claims of Plaintiff Patrick Lynch ("Lynch"), as Trustee of the Health & Welfare Fund and Retiree Health & Welfare Fund of the Patrolman's Benevolent Association of the City of New York ("PBA Plans"), based upon the New York Consent Judgment, pursuant to Fed. R. Civ. P. 56 and Local Rule 7-4.01(E), state as follows:

A. Lynch's Claims in this Lawsuit.

1. Patrick Lynch is the Trustee of the Health and Welfare Fund of the Patrolmen's Benevolent Association of the City of New York and the Retiree Health and Welfare Fund of the Patrolmen's Benevolent Association of the City of New York ("PBA plans"). *See Lynch* Complaint, attached hereto as Exhibit 4, at ¶¶ 1, 14; *See also* this Court's March 31, 2014 Opinion, Memorandum and

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Order ("MSJ Order"), Dkt. No. 583, attached hereto as Exhibit 2, at p. 11.

2. The PBA plans provide prescription drug benefits to current and retired New York City police officers and their beneficiaries, who receive these benefits as part of their union benefits as negotiated through a collective bargaining agreement with the City of New York and pay no premiums in connection with these benefits. *See Lynch* Complaint, ¶ 14; *See also* MSJ Order, p. 11.

3. The PBA plans are funded by the City of New York. *See Lynch* Complaint, ¶ 14; *See also* Defendants' Statement of Uncontroverted Material Facts in Support of their Motion for Summary Judgment on Claims of New York Plaintiffs, filed July 2, 2010, Dkt. No. 425 (the "2010 SOF"), at ¶ 51 and Exhibits 8 and 9 thereto; and Plaintiffs' Joint Response to Defendants' Statement of Uncontroverted Material Facts in Support of their Motion for Summary Judgment on Claims of New York Plaintiffs, filed Sept. 13, 2010, Dkt. No. 448 ("Lynch's 2010 Response"), at ¶ 51 (admitting fact); *See also* MSJ Order, p. 11.

4. The PBA Plans are governmental plans and are not subject to ERISA. *See* 2010 SOF, at ¶ 49; Lynch's 2010 Response, at ¶ 49 (admitting fact); *See also* Plaintiffs' Statement of Uncontested Facts in Support of Plaintiffs' Motion for Summary Judgment, filed by *Lynch* on February 16, 2010, MDL Dkt. No. 394-2 (Attachment 1), at ¶ 2; *See also* MSJ Order, p. 11.

5. NPA served as PBM for the PBA plans from 1981-2002. *See Lynch* Complaint, ¶ 14; *See also* MSJ Order, p. 11.

6. In April 2002, Express Scripts purchased NPA, and NPA became a subsidiary of Express Scripts. *See Lynch* Complaint, ¶¶ 14-16; *See also* MSJ Order, pp. 2, 11.

7. Lynch alleges that from April 2002 through August 2002, Express Scripts served as PBM to the PBA Plans. *See* Complaint, ¶¶ 14, 16, 22; *See also* MSJ Order, p. 11.

B. The New York Attorney General's Lawsuit.

8. On August 4, 2004, the New York Attorney General brought a lawsuit against Express Scripts, Inc. and other defendants. *See* Complaint in Attorney General Lawsuit ("AG Complaint"), attached hereto as Exhibit 5; *See also* MSJ Order, p. 3.

9. The New York Attorney General brought its lawsuit on behalf of: (1) the People of the State of New York; (2) the State of New York, and (3) the New York Department of Civil Service ("NY DCS"), the administrator of the New York State Health Insurance Plan ("NYSHIP") and the Empire plan. *See* AG Complaint, ¶¶ 6, 24-27; *See also* MSJ Order, p. 3.

10. The NY AG brought his lawsuit pursuant to three statutory bases: (1) NY Executive Law § 63(1), under which the Attorney General is empowered to prosecute and defend all actions and proceedings in which the State of New York is interested; (2) NY Executive Law § 63(12), under which the People of the State of New York, by the Attorney General of the State of New York, are empowered to seek injunctive relief, restitution, damages, and costs against any person or business entity that has engaged in alleged repeated fraudulent

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or illegal acts in the conduct of a business; and (3) NY General Business Law ("GBL") Article 22-A, § 349 (the New York consumer protection statute), under which the People of the State of New York, by the Attorney General of the State of New York, are authorized to seek injunctive relief, restitution and civil penalties against any person or business entity which has engaged in alleged deceptive acts or practices or false advertising in the conduct of a business. *See* AG Lawsuit, ¶ 27; *See also* 2010 SOF, at ¶ 13; Lynch's 2010 Response, at ¶ 13 (admitting fact); *See also* MSJ Order, p. 3.

C. The Settlement Agreement and Consent Judgment.

11. On or about July 25, 2008, the State of New York entered into a Consent Order and Judgment ("Consent Judgment") with Express Scripts and other defendants. *See* Consent Judgment, attached hereto as Exhibit 1; *See also* MSJ Order, p. 6.

12. The Consent Judgment recites that it was entered into by the Plaintiffs, which it defines as "the People of the State of New York, the New York State Department of Civil Service, and the State of New York." *See* Consent Judgment, at p. 1, and ¶ 22; *See also* 2010 SOF, at ¶ 22; Lynch's 2010 Response, at ¶ 22 (admitting fact); *See also* MSJ Order, p. 6.

13. The Consent Judgment binds "ESI," which is defined to include "Express Scripts, Inc. and ESI Mail Pharmacy Service, Inc, and their respective past and present subsidiaries, affiliated companies, corporate predecessors, successors and assigns." *See* Consent Judgment, ¶ 16; *See also* MSJ Order, p. 6.

14. Pursuant to the Consent Judgment, the Defendants agreed to pay $27 million "to the State, in full and complete settlement of all causes of action asserted in the Complaint in this matter." *See* Consent Judgment, ¶ 4; *See also* MSJ Order, p. 6.

15. ESI agreed to implement specific injunctive relief that will inure to every Client Plan and Consumer in New York. *See* Consent Judgment, ¶¶ 26-42; *See also* MSJ Order, p. 6.

16. The Consent Judgment broadly defines "Client Plan," to mean "the Empire Plan and any other pharmacy benefit plan with its principal place of business in New York State for which Defendants either provide or administer a pharmacy benefit plain in New York State." The definition exempts only (i) federal government entities and programs, and (ii) any state other than New York, including any agencies or subdivisions of such other states. *See* Consent Judgment, ¶ 9; *See also* 2010 SOF, at ¶ 26; Lynch's 2010 Response, at ¶ 26 (admitting fact); *See also* MSJ Order, p. 6.

17. The Consent Judgment defines "Consumer" as any "person who receives prescription drug benefits under a plan sponsored by a Client Plan." *See* Consent Judgment, ¶ 10; *See also* 2010 SOF, at ¶ 27; Lynch's 2010 Response, at ¶ 27 (admitting fact); *See also* MSJ Order, pp. 6-7.

18. The Consent Judgment contains the following "Release":

> The Plaintiffs, individually and collectively, release all Defendants and their respective past and present parent corporations, subsidiaries, affiliates, limited liability companies, and partnerships, and the respective past and present officers, directors, employees, agents, and attorneys of any of them, as well

> as the respective predecessors, successors, executors, administrators and assigns of any of them (collectively, the "Released Persons") from any and all civil claims, damages, penalties, and causes of action, which the Plaintiffs could have asserted through and including the Effective Date of this Judgment, related either to the parties' performance under the contracts or subcontracts specified in the Complaint or any amendments thereto, or to any allegations, omissions, or acts that are contained in the Complaint filed in this action (the "Covered Conduct").

See Consent Judgment, ¶ 44(a); *See also* MSJ Order, p. 7.

19. The Consent Judgment further provides:

> The Plaintiffs covenant and agree that they shall not proceed with or institute any civil action or proceeding, either individually or collectively, against the Released Persons, including but not limited to an action or proceeding seeking restitution, injunctive relief, fines, penalties, attorney fees, or costs, for any conduct undertaken or omissions, up through and including the Effective Date of this Judgment, relating to the Covered Conduct.

See Consent Judgment, ¶ 44(b); *See also* MSJ Order, p. 7.

D. Procedural History.

20. On July 2, 2010, Express Scripts filed a motion for summary judgment pertaining to five lawsuits brought by New York plans in this Multidistrict Litigation ("MDL"), including Lynch (the "NY Plaintiffs") ("Res Judicata Motion") [Dkt. ## 423-425].

21. On March 31, 2014, this Court entered its Opinion, Memorandum and Order, granting Express Scripts' Res Judicata Motion ("MSJ Order"). *See* Dkt. No. 583, MSJ Order, attached hereto as Exhibit 2.

22. On May 27, 2015, the Eighth Circuit Court of Appeals issued its Opinion. *See* Eighth Circuit Opinion, attached as Exhibit 3.

Dated: June 25, 2015

Respectfully Submitted,

HUSCH BLACKWELL LLP

By: /s/ Thomas M. Dee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of June, 2015, the foregoing was filed electronically with the Clerk of Court, to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Thomas M. Dee

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